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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-232

PACIFIC FIDELITY LIFE INSURANCE CO. and
BANKERS MORTGAGE COMPANY OF CALIFORNIA,
Petitioners,

v.

DAVID DEVOTO and CHARLES F. VOLK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief

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October 6, 1975

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Petitioners' Reply Brief

Respondents' brief in opposition neither disputes petitioners' analysis of the three substantial legal issues presented by the petition nor addresses the conflicts among the circuits on those issues. Instead, respondents rest their opposition to the petition entirely upon the contention that

petitioners have "misstated," "fabricated," "converted," "distorted," "ignored" and "avoided" the facts.[1]

Respondents not only implicitly concede the validity of petitioners' analysis of the three legal issues before the Court. Their version of the facts also emphasizes how clearly those important issues are presented by this case. Petitioners do not dispute that the seven "principal facts" on which respondents rely at pages 21-22 of their brief are consistent with a commonplace tortious interference with contract. But the only anticompetitive purpose or effect urged by respondents to convert a tortious interference case into a violation of the Sherman Act[2] is the corporate affiliation between petitioners, and their alleged desire to keep the business of mortgage protection insurance within the Transamerica corporate family.

Petitioners' argument is not, as respondents would have it, that "all that is present here is the exercise of a business decision."[3] The pivotal issue is whether a tortious

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1. pp. 5, 20, 21, 23, 24. Respondents have not cited a single such fact in support of their accusation. Indeed, the "principal facts" on which respondents rely at pages 21-22 of their brief are candidly set forth at pages 6-7 of the petition. In contrast, respondents' 16-page statement headed "The Basic Facts" is replete with allegations which (1) appear nowhere in the record, *i.e.*, that Bankers kept Transamerica personnel informed of its negotiations with Bankers (p. 10) and that American's estimate of 10% penetration was "very conservative" (p. 8); and (2) distort the record, *e.g.*, the citation of facts relating to loss experience only as indicative of Pacific's "performance" (p. 11) and the suggestion that Pacific's 3% penetration on an old insurance program is comparable to its expectations on a new "admittedly superior" program (p. 8).

2. This action was not filed until after expiration of the two-year period of limitations on a tortious interference claim, as set forth in California Code of Civil Procedure section 339(1). Respondents claim that the tort occurred on and before June 25, 1968 (Brief in Opp. at 16). The complaint was filed on July 15, 1970 (Appendix D to the Petition at 33).

3. Brief in Opp. at 22.

interference violates the Sherman Act where it is directed at the relationship between an affiliate and an outside competitor.[4] That is the issue to which pages 8-14 of the petition are directed. And that is an issue on which the brief in opposition is utterly devoid of analysis.

Respondents also seek to divert attention from the McCarran Act issue by arguing that their factual contentions do not support the position they attribute to petitioners. Petitioners' McCarran argument, however, is not that "insurance companies are *ipso facto* immune from the antitrust laws or that the mere presence of an insurance company in a conspiracy to restrain trade immunizes all the other participants in the conspiracy."[5] The trade involved in this case was the sale of insurance by competing insurance companies, and the important McCarran issue is whether an alleged conspiracy to restrain such trade is within the "business of insurance." Respondents ignore that issue altogether, cite no cases, and pay no heed to the Court's opinion in *National Securities*.[6]

Likewise on the standing issue, respondents sidestep the conflict between the decision below and decisions of courts of appeals in the First, Second, Third, Sixth and Tenth Circuits on similar facts. They specifically ignore the contrary result in the First Circuit on a virtually identical claim by an insurance agent for alleged lost commissions.[7] The Court's decisions relied on by respondents are not in

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4. Brief in Opp. at 23.

5. Brief in Opp. at 24.

6. *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1968).

7. *Miley v. John Hancock Mutual Life Ins. Co.*, 148 F.Supp. 299 (D. Mass. 1957), *aff'd per curiam*, 242 F.2d 758 (1st Cir. 1957), *cert. denied*, 355 U.S. 828, 78 S.Ct. 38 (1957).

point, as none involved a claim of injury suffered by reason of a relationship with a competitor of defendant.

Respondents' transparent attempt to divert attention from the substantial issues raised by this petition is persuasive evidence of respondents' inability to defend the decision below. Neither the importance of the issues nor the conflict among the circuits on each of them is disputed by the brief in opposition. On the contrary, respondents have merely underscored the propriety of review by the Court of the three basic and recurring antitrust issues presented by the petition.

Respectfully submitted,

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